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No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

EGBERT BAGG, IV and CAROLINE BAGG MONSON,

PETITIONERS,

-V.-

NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

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December 17, 1990

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QUESTIONS PRESENTED

1. Where the New York State Department of Environmental Conservation seeks to condemn approximately 1000 acres of wild land in which petitioners have life estates giving them exclusive use of eight acres plus nonexclusive hunting, fishing and other use rights in the whole tract; and where the State professes that it will take the fee subject to the life estates but petitioners contend that the condemnation will impair their life estates; do petitioners have federal standing to challenge (1) the taking of the fee simple interest in the whole tract and (2) the "taking" under the Takings clause of their hunting, fishing and other rights?

2. Under the Takings and Due Process Clauses, does it constitute a permissible public use for New York to take approximately 1000 acres of land by eminent domain merely to increase the size of the

2.4 million acre Adirondack Forest Preserve where there is no specific legislative mandate to do so and, if so, must a conservation easement be taken in lieu of the fee simple interest under the Equal Protection Clause because it is the least restrictive means of accomplishing New York's objective?

3. In a "test case" where in the last 25 years eminent domain has been used just one other time to seize property from an unwilling seller similarly situated, have the property owners been singled out to bear the burden of the State's efforts to acquire park land and preserve the environment though they have not contributed to the State's environmental or acquisition problems any more than other landowners, and, if so, does the State's use of eminent domain in the "test case" violate the Equal Protection clause?

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IN THE SUPREME COURT OF THE UNITED STATES

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NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

The petitioners, Egbert Bagg, IV and Caroline Bagg Monson, respectfully pray that a writ of certiorari issue to review the order of judgment of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, entered in the above entitled proceeding on November 6, 1989 pursuant to an opinion of said Court rendered on October 19, 1989.

OPINIONS BELOW

The opinion of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, from which petitioners seek review hereby, is reported at 151 A.D.2d 34, ___ N.Y.Supp.2d ___ and is reprinted in the appendix hereto beginning at p. A7, infra. The decision and order of Hon. Thomas C. Jorling, Commissioner of Environmental Conservation of the State of New York, dated December 22, 1988, is unreported. It is reprinted in the appendix hereto beginning at p. A20, infra.

JURISDICTION

Petitioners seek review of an order of judgment of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, entered on November 11, 1989 upon an opinion rendered on October 19, 1989. (Appendix, p. A7.)

Petitioners filed a timely notice of appeal to the New York State Court of Appeals. The Court of Appeals entered an order on April 3, 1990 sua sponte dismissing said appeal on the ground that "no substantial constitutional question is directly involved." (Appendix, p. A5.)

Petitioners thereupon timely sought leave from the Supreme Court of the State of New York, Appellate Division, Third Judicial Department to appeal the November 11, 1989 order of judgment to the Court of Appeals of the State of New York; leave was denied by order of the Appellate Division dated June 4, 1990. (Appendix, p.

A3.)

Petitioners thereupon timely sought leave from the Court of Appeals itself to appeal the said November 11, 1989 order of judgment; the Court of Appeals denied leave by order dated September 18, 1990. (Appendix, p. A1.)

This petition is timely in that it is filed within ninety days after the entry of the Court of Appeals' order dated September 18, 1990, the final order from which the time prescribed by 28 U.S.C. § 2101(c), is measured.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1 of Article XIV of the New York State Constitution reads, in pertinent part, as follows:

"§ 1. The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed."

Section 101 of the Eminent Domain Procedure Law reads as follows:

"§ 101. Purpose. It is the purpose of this law to provide the exclusive procedure by which property shall be acquired by exercise of the power of eminent domain in New York state; to assure that just compensation shall be paid to those persons whose property rights are acquired by the exercise of the power of eminent domain; to establish opportunity for public participation in the planning of public projects necessitating the exercise of eminent domain; to give due regard to the need to acquire property for public use as well as the legitimate interests of private property owners, local communities and the quality of the environment, and to that end to promote and facilitate recognition and careful

consideration of those interests; to encourage settlement of claims for just compensation and expedite payments to property owners; to establish rules to reduce litigation, and to ensure equal treatment to all property owners."

Section 201 of the Eminent Domain Procedure Law reads as follows:

"§ 201. Public hearings. Except as provided herein, prior to acquisition, the condemnor, in order to inform the public and to review the public use to be served by a proposed public project and the impact on the environment and residents of the locality where such project will be constructed, shall conduct a public hearing in accordance with the provisions of this article at a location reasonably proximate to the property which may be acquired for such project."

Section 202 of the Eminent Domain Procedure Law reads as follows:

"§ Section 202. Notice.
(A) Where a public hearing is required by this article the condemnor shall give notice to the public of the purpose, time and location of its hearing setting forth the proposed location of the public project including any proposed alternate locations, at least ten but not more than thirty days prior to such public hearing by causing such notice to be published in at least five successive issues of an official daily newspaper if there is one designated in the locality where the project will be

situated and in at least five successive issues of a daily newspaper of general circulation in such locality. If the official newspaper is one of general circulation in such locality, publication therein as specified shall be deemed sufficient compliance.

(B) In the event that the only newspaper available in such locality is a weekly publication the above described notice shall be published in such newspaper in at least two successive issues.

(C) Inadvertent failure to notify a person or persons entitled to notice under this section shall not be jurisdictional nor construed to affect the validity of any title acquired by a condemnor under this law."

Section 203 of the Eminent Domain Procedure Law reads as follows:

"§ 203. Conduct of the public hearing. At the public hearing the condemnor shall outline the purpose, proposed location or alternate locations of the public project and any other information it considers pertinent, including maps and property descriptions of the property to be acquired and adjacent parcels. Thereafter, any person in attendance shall be given a reasonable opportunity to present an oral or written statement and to submit other documents concerning the proposed public project. A record of the hearing shall be kept, including written statements submitted. Copies of such record shall be available to the public for examination without cost during normal business

hours at the condemnor's principal office and the office of the clerk or register of the county in which the property proposed to be acquired is located. Copies shall be reproduced upon written request and payment of the cost thereof. Further adjourned hearings may be scheduled."

Section 204 of the Eminent Domain Procedure Law reads as follows:

"§ 204. Determination and findings.
(A) The condemnor, within ninety days after the conclusion of the public hearings held pursuant to this article, shall make its determination and findings concerning the proposed public project and shall publish a brief synopsis of such determination and findings in at least two successive issues of an official newspaper if there is one designated in the locality where the project will be situated and in at least two successive issues of a newspaper of general circulation in such locality. If the official newspaper is one of general circulation in such locality, publication therein as specified shall be deemed sufficient compliance. The synopsis shall include those factors set forth in subdivision (B) herein, and shall also state that copies of the determination and findings will be forwarded upon written request without cost.
(B) The condemnor, in its determination and findings, shall specify, but shall not be limited to the following:
"(1) the public use, benefit or purpose to be served by the proposed

public project;
"(2) the approximate location for the proposed public project and the reasons for the selection of that location;
"(3) the general effect of the proposed project on the environment and residents of the locality;
"(4) such other factors as it considers relevant."

Section 207 of the Eminent Domain Procedure Law reads as follows:

"§ 207. Judicial review.
"(A) Any person or persons jointly or severally, aggrieved by the condemnor's determination and findings made pursuant to section two hundred four of this article, may seek judicial review thereof by the appellate division of the supreme court, in the judicial department embracing the county wherein the propcsed facility is located by the filing of a petition in such court within thirty days after the condemnor's completion of its publication of its determination and findings pursuant to section two hundred four herein. Such petition shall be accompanied by proof of service of a demand on the condemnor to file with said court a copy of a written transcript of the record of the proceeding before it, and a copy of its determination and findings. Upon receipt of such petition and demand, the condemnor shall forthwith deliver to the court a copy of the record and a copy of its determination and findings. The proceedings shall be heard on the record without requirement of reproduction. If such proposed

public improvement is located in more than one judicial department such proceeding may be brought in any one, but only one of such departments and all such proceedings with relation to any single public project shall be consolidated with that first filed.

"(B) The jurisdiction of the appellate division of the supreme court shall be exclusive and its judgment and order shall be final subject to review by the court of appeals in the same manner and form and with the same effect as provided for appeals in a special proceeding. All such proceedings shall be heard and determined by the appellate division of the supreme court, and by the court of appeals, as expeditiously as possible and with lawful preference over other matters.

"(C) The court shall either confirm or reject the condemnor's determination and findings. The scope of review shall be limited to whether:

"(1) the proceeding was in conformity with the federal and state constitutions,

"(2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority,

"(3) the condemnor's determination and findings were made in accordance with procedures set forth in this article, and

"(4) a public use, benefit or purpose will be served by the proposed acquisition."

STATEMENT OF THE CASE

Petitioners, Egbert Bagg IV and Caroline Bagg Monson, are siblings who own interests in Pine Lake, an approximately one thousand acre wilderness tract located in the southern range of the Adirondack Mountains.[1] Forested, with streams and two small lakes, the Pine Lake property has been in their family in one form or another for five generations, over 120 years. They hold life estates in an eight-acre parcel where stands an eighty year old, classic Adirondack cabin with no indoor plumbing, no electricity and no telephone -- a relic of Theodore Roosevelt's time, when down-

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1. The property is within the Adirondack Forest Preserve, also called the Adirondack Park, which is six million acres in size. The State of New York owns 40%, or 2.4 million acres. All state-owned land in the Forest Preserve is subject to the constraints of the "forever wild" clause of Article XIV of New York State's Constitution. Once land is added to the Forest Preserve, it is never again available for private development; it is permanently removed from commercial timber harvesting; its only function is to remain wild.

staters dotted the mountains with its likes. In addition to their life estates, petitioners hold deeded rights of a more general nature in the overall property: the right to ingress and egress over an easement to the public highway, the right for themselves and their families and guests to hunt and fish, the right to cut firewood, and the like. In short, they have the right to make every use of the property to which it is susceptible, jointly with the fee owner. Access to the property is over a State-owned, four-mile dirt road which crosses the West Canada Creek. Previously, the road was traveled by horse and wagon; today it is traversable by a four wheel drive vehicle, motor bike or on foot. Today, the road is used solely by the families of the life tenants and the two individual fee owners.

The property was purchased around

1890 by a small group including Egbert Bagg II, petitioners' grandfather, for use as a hunting and fishing club. The Pine Lake Club held it for over sixty years as a wilderness tract, carefully preserving its environment. There is a small deer population, bear and otter are sometimes seen; and there has been a pair of common loons nesting there annually for as long as anyone can remember. In 1950 the Club sold the fee to petitioners' father, who, in turn, sold to the present Syracuse China Company for $15,000, reserving in petitioners the rights described above.

Syracuse China offered the Pine Lake Property to its employees for outdoor recreation until the early 1970's, when the company virtually abandoned the whole parcel. Up until Syracuse China's departure, the summer people populating the lake numbered 30 at most, and then only over a "big" weekend like the Fourth of

July; it was rarely visited in winter. During Syracuse China's twenty year occupancy, the Bagg and Monson families' Pine Like journal recorded that the pair of Common Loons there raised only one chick to maturity. In the years since, with the departure of the Syracuse China population, the same journal documents that the loons raised one or two chicks to maturity every year once the property was occupied solely by the life tenants and their families, and by one other family since 1988. Today, because of its inaccessibility and the efforts of its owners, especially Bagg and Monson, Pine Lake is pristine and unspoiled, its waters potable, brook trout in its streams, and not a sign of litter.

Enter the State of New York Department of Environmental Conservation ("DEC"), resolved to add Pine Lake to its multi-million acre Adirondack Forest Pre-

serve, a public park. Syracuse China put Pine Lake up for sale shortly after it abandoned it. DEC representatives negotiated unsuccessfully with the company for at least ten years. DEC's internal regulations dictate that the State cannot pay more than fair market value to acquire property for the Adirondack Forest Preserve. Syracuse China wanted in the neighborhood of $100,000 more for Pine Lake than DEC was willing or able to pay and negotiations always ended in a stalemate. Deborah Bagg Gee and her husband also negotiated with Syracuse China and purchased a one-year exclusive option to buy the property for $25,000, but were unable to complete the purchase because the anticipated funds did not materialize.

By 1988, the State was clamoring to acquire more wilderness land. This came about because the legislature had appropriated huge sums to be used by the State to

acquire property, but DEC was having trouble spending it. There were allegations by environmental groups and in the media that DEC had lost out on getting some attractive properties through slow movement and bungling. Feeling the rapidly intensifying public pressure to spend the appropriations, DEC wrote to Syracuse China on April 1, 1988, advising that it planned to commence an eminent domain proceeding to acquire Pine Lake. But Syracuse China already had a sale contract for $440,000 with Dr. Vincent Vaccaro, a physician practicing in nearby Utica, and his wife. Syracuse China advised the Vaccaros of the State's intentions, but the Vaccaros chose to proceed with the sale and closed the purchase in July of 1988. A few days later, the State began an eminent domain proceeding under the New York Eminent

Domain Procedure Law ("EDPL")[2] by publishing the required legal notice in the local newspapers, listing Syracuse China, not the Vaccaros, as the owner. In the last 25 years, eminent domain has never been used by DEC to preserve the environment or acquire Forest Preserve property from an unwilling Seller except in this and one other case.

The statutory local public hearing produced 95 persons opposed to the taking and five who favored it; written statements received were 500 against, 60 for; petitions with the signatures of 1,300 people opposing eminent domain were filed. Bagg family members, who came from as far away as California and Texas, gave evidence that there was nothing special or unique about Pine Lake as compared to other pri-

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2. All EDPL references are to 11A New York Consolidated Laws Service (1986).

vate property in the vicinity, to say nothing of property currently owned by the State. A State official told a Bagg family member that this is a "test case."

Indeed, it is undisputed that, although lovely and unspoiled, the property is in no way unique. It harbors no rare or endangered species of fauna or flora, with the possible exception of the loons which may or may not be threatened in New York, depending upon whose statistics are believed. It is not threatened by development. DEC stated that the purpose of the taking was to round out State holdings, to limit vehicular access, and to increase public recreational opportunities. Much opposing testimony deplored the unprecedented use in New York of the condemnation power for such a purpose, pointing out its unsettling effect on titles and on the use and enjoyment of private property in the

Adirondacks, on the functioning of an orderly and efficient land market, and on the critical mass of timber available in the region to the forest products industry. Evidence was presented that New York State already owned approximately 729,000 acres (over two-thirds) of the land in Hamilton County alone (the county in which Pine Lake is located), and that the State-owned Adirondack Forest Preserve comprises 2.4 million acres of the 6 million acres in the Adirondacks. No evidence whatsoever was presented: (1) that additional recreational opportunities for the public are needed; (2) as to just what administrative and environmental problems might result from increased usage of the access road; (3) that there was an increased use of the access road or might be in the future; (4) that there had ever been any environmental damage done to the rock-bedded West Canada Creek by motor vehicles, and (5) that

development was about to occur or was even contemplated, except for logging. Finally, the DEC official testifying at the public hearing told the public that the place where the access road crosses the West Canada Creek is within a designated "Wild River" area where roads are prohibited by statute, thus necessitating the taking of Pine Lake. After the DEC Commissioner had ordered the condemnation, petitioners discovered from the State's brief to the appellate court ("the Third Department") which set forth the boundaries of the "Wild River" and from subsequent examination of DEC's maps that the access road crosses the West Canada Creek outside of the "Wild River" area and had never been located within it. The DEC official's public statement at the hearing on this point was simply not true. Petitioners do not know if the Commissioner knew of the error when

he announced his decision to take the property.

The public hearing process also produced statements of opposition to the taking from the Mayors and Supervisors of eighteen towns. Formal resolutions (all indicating unanimous votes) opposing the use of eminent domain to acquire Pine Lake passed by the Hamilton County Board of Supervisors, the Hamilton County Soil and Water District, the Adirondack Park Local Government Review Board, and the Towns of Morehouse and Lake Pleasant were filed. Two New York State Assemblymen expressed strong opposition to the acquisition and indicated that they thought the intent of the New York State Eminent Domain Procedure Law ("EDPL") was being violated. Four groups opposed the acquisition, including two loggers' associations. Virtually everyone who indicated opposition to the taking felt that the property was an inap-

propriate object for the exercise of eminent domain, and that such a taking would be contrary to the intent of the EDPL, in derogation of private property rights, and, possibly, unconstitutional.

After the public hearing but before its results were announced, the Vaccaros sought to settle with DEC by offering a conservation easement in lieu of the fee. They offered to deed to the State their rights to develop and to log, and even offered to negotiate a right of first refusal with the State should they offer Pine Lake for sale in the future. The Vaccaros were told that these proposals do not suit DEC's purposes. The offer remains open today.

Evidence that environmental harm would result from the taking was also presented. A Bagg family member observed that (1) the Pine Lake environment is

delicate; (2) that the two lakes are small, capable of supporting a limited number of fish, and (3) the deer herd is small. Unlimited public hunting and fishing would shortly produce fished-out lakes and eliminate the deer, she said. Further, large numbers of people might cause the loons to fail to reproduce, as during the Syracuse China years, or worse, to leave Pine Lake altogether. Others stated that it is an established fact that unmanaged woodlands as in the Forest Preserve, where the State Constitution does not allow any trees to be cut, are starvation zones for native wildlife providing little if any cover and ground level food. It was argued that preservation of the public-private "checkerboard" pattern would maintain a diversity of habitats necessary to maintain a diversity and abundance of wildlife; acquisition would destroy a portion of the checkerboard pattern with detrimental impacts on wild-

life. Finally, it was observed that the Pine Lake access road would more likely be overburdened by the general public's use thereof.

There were also differing opinions on logging the property. Proponents of the taking saw the possibility of environmental harm from logging --- opponents felt that logging can co-exist with other uses.

At the conclusion of a remarkable report, filed the following November, the State hearing examiner, himself a DEC administrative law judge, summarized the evidence presented:

> "[A]lthough there is some support for the proposed action, the overwhelming sentiment of the public which participated in the hearing process is that there is nothing particularly unique about the properties, and no public need which will be served, sufficient to justify appropriation under the EDPL. Acquisition is generally viewed to benefit, not millions of citizens of

the State, but only those few recreationists who may be able to travel to, and are physically capable of negotiating, the properties. It is generally perceived that any benefit from the proposed acquisition through the use of eminent domain would be far outweighed by adverse impacts on real estate transactions, private management of land, the forest products industry, and citizens' sense of security in the proper functioning of their government." [Emphasis in original]

The Commissioner brushed these findings aside, however, stating in his "Findings and Determination":

"2. The parcels comprising the forest land are entirely surrounded by state-owned Forest Preserve lands. Appropriation as proposed, would accomplish the Department's objectives by:

"a) Consolidating state-owned Forest Preserve lands;

"b) Providing additional recreational opportunities for the public;

"c) Eliminating administrative and environmental problems associated with increased usage of an access road;

"d) Protecting the natural resources of the property from further development.

"3. The life estate enjoyed by Egbert Bagg IV and Caroline Bagg Monson on a portion of the Pine Lake Property will be honored and the appropriation will

be subject to these rights."

On the basis of the foregoing, the Commissioner ordered the condemnation of the Pine Lake property. He did so in the face of a then-existing New York appellate decision severely restricting the Commissioner of Environmental Conservation's right to use eminent domain to take private land for public use under New York's environmental protection laws. Petitioners appealed unsuccessfully to the New York State Supreme Court, Appellate Division, Third Judicial Department ("the Third Department"), which found them without standing to complain of their impending loss of joint private use of the Pine Lake property with the Vaccaros. None of petitioners' arguments were ruled upon, but similar arguments advanced by the Vaccaros were.

All of the petitioners' arguments were raised in the court of first instance,

the Third Department, from which they were dismissed for lack of standing and the merits of their contentions never reached; no other court has addressed the merits of petitioners' arguments.

The issue of petitioners' standing was raised in the Brief for Petitioners on pages 24 through 27 and in the Reply Brief for Petitioners on pages 16 through 19. Petitioners' constitutional challenges involving public use, the Takings, Due Process and Equal Protection Clauses were raised in the Brief for Petitioners at pages 6 through 16. The Third Department rejected their standing argument on pages 3 and 4 of its opinion. (Page references are to the original opinion, not the version included in the appendix.)

Petitioners' cause was combined with the Vaccaros' appeal from the Commissioner's decision in the Third Department.

The Vaccaros raised the public use, Takings Clause, and Due Process Clause issues on pages 3 through 14 of their brief; the issue of the proffered conservation on pages 9 through 11. Public use was raised again in the Vaccaros' reply brief.

The Third Department rejected the Vaccaros' public purpose argument in the final two paragraphs on page 5 of its opinion, implying that it did so under some blend of the Takings and Due Process standards. The Third Department never addressed the conservation easement issue, other than to say that they found the Vaccaros' other contentions to be without merit in the last sentence of the opinion. No other court reached the merits of the Vaccaro case.

REASONS FOR GRANTING THE WRIT

1. The Pine Lake Case Is Especially Important Because The Supreme Court Is Called Upon to Decide a Question Fundamental to American Society: Where do the Rights of Private Citizens to Own and Enjoy Property End, and Where do the Public's Rights to a Preserved Environment and Public Park Land Begin?

Today, the environment is a pressing topic. As government officials formulate their environmental programs and policies for the 21st century, they must be able to determine when and how their actions are circumscribed by the Constitution. Allowance of the writ in the Pine Lake case would present a timely opportunity for the Court to provide such guidance.

Constitutionally, when are the rights of an occasional hiker or fisherman to be viewed as superior to the rights of a wilderness landowner to own and enjoy his property? Variations on this issue are bound to recur.

At the oral argument before the

Third Department, the State's lawyer was asked if the State could use eminent domain to take all of the land in the Adirondacks, to which he answered in the affirmative. If this taking is upheld, DEC will view it as a blank check to eliminate private ownership in a six million acre area, approximately the size of the State of Vermont.

2. The Third Department's Denial of Standing Thwarted Petitioners' Right to Review of a Federal Constitutional Question And is in Conflict with Prior Decisions of This Court; a Conflict on this Standing Issue Also Exists in the Circuits, Warranting Review by This Court.

The Third Department concluded that petitioners were not "aggrieved persons" under EDPL § 207 because they were only life tenants whose rights the Commissioner contends will not be disturbed when he takes the fee simple. It is plain, however, that petitioners' life uses will be impaired in fact by the taking.

The Third Department's analysis

rests on the discredited "legal interest" test for standing rather than on the "zone of interests" test adopted by the New York Court of Appeals in 1975.[3] No reference was made in the Third Department's opinion to the fact that petitioners had alleged harmful effects to constitutionally protected property rights.

The standing determination in this Court is, however, a federal question to be decided here de novo and based upon its own precedents. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Princeton v. Schmid, 455 U.S. 100 (1982).

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3. The New York decision which adopted the zone of interests test was Dairylea Cooperative, Inc. v. Walkley, 38 N.Y.2d 6 (1975). See also, Douglaston Civic Association, Inc. v. Galvin, 336 N.Y.2d 1 (1974). The perimeter of the "zone of interests" is not reached until the harm asserted as the basis for standing represents no greater injury than that experienced by an ordinary member of the public. Sunbright Car Wash, Inc. v. Board of Zoning and Appeals of the Town of North Hempstead, 69 N.Y.2d 406 (1987).

Even if federal standing would not ordinarily exist in an Article III court, this Court may exercise jurisdiction by way of certiorari to review a state court judgment which decided a federal question to the direct, specific and concrete injury of petitioners. Asarco Inc. v. Kadish, 490 U.S. 605 (1989). Like the beach-front property owners in Nollan v. California Coastal Commission, 483 U.S. 825 (1987), petitioners are to be forced by the State to share what is theirs with the general public. The land in which they have a partial life estate and overall rights of use will itself become public, so that rather than sharing its use with one fee owner they must share it with whoever comes by. Their loss is as obvious as the conclusion that they must be deemed to have

standing.[4]

Denial of standing by the Third Department cannot be squared with this Court's authorities on the nature and character of a property interest sufficient to confer standing. For example, Fuentes v. Shevin, 407 U.S. 67 (1972) holds the mere possession of goods by a contract vendee with no title sufficient to support a due process claim relating to replevin procedures.[5]

In addition, a conflict or near-

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4. This Court has long recognized the need for a contextually rooted, pragmatic federal standard for standing. See Sierra Club v. Morton, 405 U.S. 727 (1972); United States v. SCRAP, 412 U.S. 669 (1973).

5. Other cases are emphatic that due process protects more than formalistic property rights. In New York State Board of Regents v. Roth, it was stated that "the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels or money." 408 U.S. 564, 571-572 (1972). As suggested by Roth, and made clear by Fuentes and other decisions of this Court, standing is coextensive with protected property interests. Surely life estates are protected property interests.

conflict exists in the circuits as to whether such an injury to a life tenant as results from condemnation of the fee supports standing. Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984) decided that a plaintiff shareholder in a Honduras corporation had a sufficient interest in Honduran realty owned by the corporation to confer standing to assert constitutional takings thereof by acts of the United States government. An independent basis for standing was that plaintiff had been in actual possession of the corporate real property for twenty years.[6] See

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6. Justice (then Circuit Judge) Scalia, who dissented in Ramirez, presumably would reach the same result on the facts in this case as the Ramirez majority reached there. He acknowledged in his dissent that if the plaintiff had the right under local law to prevent a trespass to the realty, he would have standing. Id., at 1556 and 1557, n. 10. It goes without saying that petitioners Bagg and Monson as life tenants manifestly have the right to prevent a trespass to the property involved in this case.

also, Brandon v. Pierce, 725 F.2d 555, 559 (10th Cir. 1984).

By contrast, Smart v. Texas Power & Light Co., 525 F.2d 1211 (5th Cir. 1976), holds that the equitable owner of an undivided interest in land lacks standing to contest a condemnation proceeding. See also, United States v. 36.96 Acres of Land, 754 F.2d 855 (7th Cir. 1985), cert. denied 476 U.S. 1108 (1986).

To grant the writ would afford the opportunity to clarify the types of property interests "cognizable" for purposes of raising constitutional questions and the oportunity to resolve the conflict in the circuits respecting this issue.

3. The Condemnation of the Pine Lake Fee Simple Effects an Ipso Facto Uncompensated Taking of Petitioners' Constitutionally Protected Property which Independently Supports Standing.

The Court's recent decision in Nollan v. California Coastal Commission, supra, 483 U.S. 825 (1987), elaborated the

doctrine of Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), that a regulation which goes too far can become a taking. In First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314-15 (1987), the Court made clear that a regulatory taking, or "inverse condemnation," can give rise to the remedy of compensation.

The recent taking cases set limits on state and local officials respecting the extent of permissible regulation of property. Yet despite its potential for abuse, the only recent pronouncement by this Court upon the public use doctrine (the principal concept limiting true condemnation) has been an uncritical endorsement.[7]

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7. In Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984), reversing and remanding 702 F.2d 788 (9th Cir. 1983), this Court embraced a far reaching use of the power of eminent domain to

Whether by regulation or by forthright condemnation proceeding, a taking is a fortiori a federal question respecting which the injured party has automatic standing.[8] Petitioners in this case contend that the taking of the fee effectively works a taking of a portion of their life estate.[9] If the Court agrees,

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...Footnote continued...

restructure the land ownership pattern in Hawaii and reallocate ownership in a truly revolutionary manner, refusing to gainsay a legislative determination of public use so long as the compensated taking was "rationally related to a conceivable public purpose."

8. Vindication of a constitutional injury may be the most compelling justification for suit known.

9. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) decided that a state statute requiring that landlords permit television cable companies to enter their apartment buildings with television cable apparatus constituted a physical intrusion of property tantamount to a taking. If a physical intrusion can be effectuated by regulation, a fortiori it can be effectuated by a fee appropriation. Petitioners are experiencing a taking here every bit as certainly as if the State of New York enacted a law mandating the opening of Pine Lake to public hunting and fishing. Such a law was found unconstitutional by one court. See

then standing is a foregone conclusion.

4. In "Taking" Petitioners' Recreational and Use Rights by Diminishing Them Without Compensation, New York has Singled Out Petitioners to Bear the Burden of New York State's Attempts to Preserve the Environment and Acquire Park Land, All in Violation of the Incorporated Takings and Equal Protection Clauses. The Third Department's Rejection of These Claims Conflicts with Applicable Decisions of this Court.

New York has used its eminent domain power against an unwilling fee owner in the Adirondacks only twice in the last 25 years. In Nollan v. California Coastal Commission, supra, 483 U.S. 825, 835-40 n.4, Justice Scalia observed, citing cases and without deciding the issue, that if the property owners could show that they were being singled out to bear the burden of California's various public beach problems,

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...Footnote continued...

n. 10, infra, and Hartman v. Tresise, 36 Colo. 146, 84 P. 685 (1906)(state statute making all Colorado waters open to public fishing held unconstitutional). See also United States v. Causby, 328 U.S. 256 (1946).

although they had contributed to them no more than other landowners, the State's otherwise valid action might violate the incorporated Takings Clause of the Equal Protection Clause.

This is that case. By diminishing the petitioners' recreational, use, and easement rights without compensation, New York has singled out petitioners to bear a disproportionate share of the burden of New York's attempts to preserve the environment, eliminate alleged administrative problems, provide the public with more recreational opportunities, and eliminate "inholdings." The Third Department erred in brushing the merits of this case aside, in the face of the Nollan footnote and the cases cited therein.

5. The Third Department erred in holding that the Constitutional Requirements that the Pine Lake Taking be for a Public Purpose have been Satisfied.

Constitutional examination of the

requirement that a taking be for a public purpose necessarily involves two inquiries: (1) where is the line drawn between a private and a "public use" in the context of the Takings Clauses of the Fifth and Fourteenth Amendments, and (2) when does the declaration that a taking is for a public use violate the due process clause of the Fourteenth Amendment?

In the Takings Clause context, the role of the judiciary in determining whether the power of eminent domain is being exercised for a public use in any given instance is an extremely narrow one. Berman v. Parker, 348 U.S. 26, 32 (1954). Nevertheless, it does exist, and has been exercised. See Missouri P.R. Co. v. Nebraska, 164 U.S. 403, 417 (1896). Clearly, preservation of the environment and providing recreational opportunities for the public are public uses in some circumstances, such as acquiring the geyser "Old

Faithful" for Yellowstone Park. The Third Department looked at the reasons for taking Pine Lake outlined by the DEC Commissioner and asked itself whether these uses were public or private, answering public. The flaw in the court's reasoning is that it failed to analyze the public use question under the circumstances of this case, failing to take into account the evidence of probable environmental harm to Pine Lake, the fact that New York will close the access road, making Pine Lake accessible only to those few who are willing and able to walk four miles uphill, etc. Without judicial review of the public use or benefit to be served by the condemnation, and taking the Third Department's reasoning to its logical conclusion, the State of New York could seize that entire State (assuming an unlimited supply of the taxpayers' money) simply by declaring that the State

will be a public park, that the environment will be preserved, and that the action will consolidate existing State lands. Alternatively, the State could raze New York City (which has enough problems with the homeless already) by simply declaring that the act would (1) eliminate administrative and environmental problems associated with increased usage of roads accessing New York City, (2) protect the natural resources of the city from further development; (3) create open space upon which the public can recreate, and, if the State owned a few parcels of land abutting the city, (4) consolidate State-owned lands.

Indeed, judicial review of the public purpose for the Pine Lake taking must occur because the EDPL requires it, just as it requires that "public purpose" be reviewed in the public hearing process and by the Commissioner condemnor in making his determination and findings. Petition-

ers maintain that at some juncture a rational purpose for further publicizing of private lands by the State becomes so attenuated as to be lost, and they believe that such is the Pine Lake case. Petitioners contend that if this Court chooses not to afford relief in this case, it would be tantamount to a declaration that there are no constitutional limits to eminent domain as long as the condemnor cries "environment" or "park" in announcing its public use.[10] Identifying a "true" public use as contemplated by the Takings Clauses is an important question of federal law which

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10. "A taking which, as a practical matter, is solely for the recreation of a limited few, even if the property taken is in theory of law open to enjoyment by the public, would be of such imperceptible public advantage that it could not be fairly said to constitute a public use, and statutes attempting to establish a public right of fishing by exercise of eminent domain have for this reason been generally held unonstitutional." (Footnote omitted.) 2A J. Sackman, Nichols, the Law of Eminent Domain, § 7.38, p. 7-246 (Rev. 3rd Ed. 1990).

should be settled by this Court.

This discussion under the Takings Clause could not be complete without distinguishing Hawaii Housing Authority v. Midkiff, supra, n. 7. That case announced extremely rigid standards for the courts' review of public uses. "In short, the Court has made it clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without foundation.'" Id., 467 U.S. at 241 (citation omitted). The Midkiff standards do not come into play here since the Midkiff condemnations were all compensated; petitioners' rights here are taken without compensation. Also, unlike Midkiff, there has been no clear legislative pronouncement authorizing the taking here. And in any event, the condemnation of Vaccaro's fee interest is indeed "palpably without foun-

dation."

Eminent domain must find its limit somewhere short of abolishing the institution of private ownership in an entire mountain region the size of a state. It has exceeded the limit, petitioners maintain, in such cases as this, where no better reason is advanced than taking more land from private hands simply to add to the 2.4 million acres of state ownership. Where the limit was exceeded is not easy to fix --- whether at a million, a million and a half, or two million acres --- but somewhere it was exceeded, such that this reflexive expansion has ceased to serve any public purpose and lurches forward on its own momentum.

Turning to Fourteenth Amendment due process, it must be noted that none of petitioners' arguments on the merits were considered by the Third Department when petitioners were dismissed for lack of

standing. This alone denied petitioners procedural due process. The right to own and enjoy property is a fundamental one. Lynch v. Household Finance Corp., 405 U.S. 538, 543-546, 552 (1972). Regrettably, the Third Department devoted only one sentence to this fundamental right in passing on the due process challenge in this case: "The appropriation of the subject property by eminent domain is supported by an adequate basis and has not been shown to be unreasonable or arbitrary." (Citations omitted.) The two cases cited in support of the court's "adequate basis, unreasonable, or arbitrary" standard are inapposite, and neither case involved the issue of due process.

Although there is older Supreme Court authority which may conflict with this Court's announcement in United States v. Carmuck, 329 U.S. 230, 243 (1946) of

what standards to apply in an eminent domain case in deciding a due process challenge under the Fourteenth Amendment, that case suggests any one of three standards: "bad faith," "reasonableness," or "arbitrary and capricious." If the writ is granted, petitioners will argue that the Pine Lake taking must fail under all three of these standards.

There have been numerous police-power regulatory takings cases involving the Takings Clauses, the most recent of which, Nollan, supra, 483 U.S. at 834, recognizes that land use regulation does not effect a taking if it substantially advances legitimate State interests and is reasonably necessary to the effectuation of a substantial government purpose. In this case, the "taking" under the incorporated Takings Clause of petitioners' recreational and use rights is accomplished by State's use of its eminent domain power, not its

regulatory power, yet the effect is the same as that in Nollan. Can the tests which apply in the police power regulatory takings cases apply here? This Court should settle this important question of constitutional law by granting the writ in this case.

As will be explained in the next paragraph, New York State law mandates a determination of public necessity when deciding whether a taking is for public use. Accordingly, the scope of this Court's review is not that articulated in Midkiff, supra, but the one promulgated by the legislature in the EDPL. Petitioners contend that the failure of the DEC Commissioner and the Third Department to properly apply New York's EDPL has denied petitioners due process of law. Also, the judicial review provision of the EDPL cannot pass muster under the due process clause.

There has been a great squabble between the petitioners and the condemnee, on one side, and the State on the other, over the issue of public necessity. The petitioners advocate that the Commissioner and the courts must address and review the public need for the Pine Lake taking, and the State insists that the Commissioner's determination of public necessity --- that power having been delegated to him by the legislature --- ends the matter and that his determination is unreviewable by the courts. The State's position correctly states the general rule, which is not without exception, but ignores the content of New York's EDPL.

The purpose of the EDPL is, among other things, "to establish opportunity for public participation in the planning of public projects necessitating the exercise of eminent domain; to give due regard to the need to acquire property for public use

as well as the legitimate interests of private property owners, local communities and the quality of the environment, and to that end to promote and facilitate careful recognition of those interests...." EDPL § 101 (emphasis added). The EDPL goes on to establish the procedures for notice, a public hearing, the receipt of written statements, and for the condemnor to issue its findings and determination within 90 days after the public hearing process is concluded. EDPL §§ 201-204. Section 207 EDPL provides for judicial review of the Commissioner's findings and determinations.

The public hearing process complied with the mandate of EDPL § 101 because the public need to acquire the Pine Lake property was thoroughly addressed; there can be no doubt of that from the hearing officer's report. In petitioners' view, the Commissioner ignored the public

necessity issue in his findings and determination by failing to give due regard to the need to acquire Pine Lake for public use as required by EDPL § 101. The Third Department upheld his findings and determination, doubling the error. Petitioners contend that the determinations of the Commissioner and the New York court denied them due process of law under the Fifth and Fourteenth Amendments to the Constitution because EDPL § 101 establishes an examination of public necessity to acquire property for public use as the "process" which is "due," and the failure of the Commissioner and the court to require due regard for public need denies petitioners due process of law.

The EDPL judicial review section on its face cannot pass constitutional muster under the due process clauses because it limits the court's review to whether the condemnor's determination and

findings were made in accordance with procedures set forth in EDPL Article 2; there is no judicial review of whether the substance of EDPL § 101 (public participation, public necessity, interests of private property owners, equal treatment of all property owners, recognition and careful consideration of all these interests) has been properly considered by the condemnor. EDPL § 101 and several Article 2 sections tell us the legislature's determination of what process is due, but the court refrained from reviewing whether the purposes of the law were fulfilled. The writ should be granted to strike down EDPL § 207 to assure that the due process guaranteed to all by the Constitution is guaranteed to future condemnees, property owners, and local communities in New York State.

6. The Petitioners' Contention that New York State Must Accept the Conservation Easement Offered in Lieu of the Fee Simple Interest in the Pine Lake Property

under "the Least Restrictive Means" Requirement of this Court's Decisions Under the Equal Protection Clause is a Substantial Federal Question Which Should Be Settled by This Court.

The Vaccaros offered to deed away their rights to commercial use, development, or logging of the Pine Lake property in the form of a conservation easement as an alternative to having their fee simple interest taken by New York by eminent domain; DEC refused to discuss the proposal. The condemnees and the petitioners then argued to the Third Department that the State was required to accept the conservation easement in lieu of the fee because it was a reasonable way to preserve the environment with a lesser burden on the Pine Lake owners' fundamental right to own and enjoy their property. The Third Department did not reach the merits of this argument.

In dicta, the New York State Court of Appeals has opined that Section 9-

0105(7) of New York's Environmental Conservation Law ("ECL"), which authorizes the State to acquire land for parks in the Adirondacks, authorizes the use of eminent domain to acquire such property, even though the State legislature did not so specify, an interpretation with which the petitioners took issue in the Third Department. Mtr. of Bath & Hammondsport R.R. Co. v. New York State Dept. of Env. Conservation, 73 N.Y.2d 434 (1989). The ECL and the accompanying appropriations for the acquisition of Adirondack lands to the end that these areas will remain "forever wild" put Adirondack property owners in a suspect class because they are in a disadvantaged position vis-a-vis all other property owners in New York; their lands are targeted for acquisition, whereas other landowners' private parcels are not.

The right to own and enjoy

property is a fundamental right, protected by the Fourteenth Amendment. Lynch v. Household Finance Corp., supra, 405 U.S. 538, 543-46, 552 (1972). Accordingly, a heavy burden rests on New York State to show that the statutes setting the Adirondack property owners apart from others are necessary to further a substantial and compelling state interest. Cf. Dunn v. Blumstein, 405 U.S. 330, 335 (1972). Of course preserving the environment is a substantial and compelling state interest (although elimination of private ownership in the entire Adirondack region by turning the whole area into a park is another matter). However, it is not enough that New York show that its Adirondack land acquisition and conservation statutes further the substantial state interest of preserving the environment to pass equal protection muster. Id., 405 U.S. at 343. If there are other, reasonable ways to

achieve the State's environmental goals with a lesser burden on the fundamental right of Adirondack landowners to own and enjoy their property, New York may not choose the way of greater interference with their property rights. Id. Accordingly, New York State must accept the offer of a conservation easement to forever preserve the pristine environment at Pine Lake rather than exercise its power of eminent domain to take the fee interest.

This interpretation of the equal protection cases is a new one, in and of itself meriting review by this Court, in petitioners' view. But there is a more important reason why this Court should settle this question now. The New York State executive and legislative branches are in the throes of formulating their environmental programs and policies for the remainder of the 1990's and the 21st cen-

tury. The executive branch formed the Commission on the Adirondacks in the 21st Century which recently promulgated its massive report of its recommendations; these recommendations are slated for legislative action next year. In its report entitled "the Adirondack Park in the 21st Century" the Commission recommended that in a case where the State desires to acquire a particular parcel for the Forest Preserve but is unable to negotiate the purchase of a fee simple interest, the State should try to get a conservation easement. The same report also recommends that eminent domain never be used to take land from an unwilling seller except on a finding that it is imminently threatened by development or is essential for access to otherwise inaccessible State land.

Judging from the media, the issue of eminent domain in the Adirondacks is a very pressing issue right now; people are

afraid that their land and homes are going to be taken next. The Commission's executive director stated at a recent public meeting that the issue of eminent domain comes up virtually every day in his office. Petitioners believe that this heightened concern in upstate New York is a result, in large measure, of the Pine Lake case. If equal protection places a constitutional restriction on the use of eminent domain when a conservation easement is offered, the executive branch, and more importantly, the legislature need to know so that the government can formulate its programs, policies, and laws accordingly.

CONCLUSION

For the foregoing reasons, petitioners Egbert Bagg, IV and Caroline Bagg Monson pray that a writ of certiorari issue to review the order of judgment of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, entered in this proceeding on November 6, 1989 pursuant to an opinion of said court rendered on October 19, 1989.

December 17, 1990

Respectfully submitted,

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APPENDIX

[FINAL ORDER OF COURT OF APPEALS DENYING LEAVE TO APPEAL]

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighteenth day of September A.D. 1990

STATE OF NEW YORK
COURT OF APPEALS

PRESENT, HON. SOL WACHTLER, Chief Judge, presiding.

Mo. No. 497

In the Matter of Vincent J. Vaccaro,
Appellant,

v.

Thomas C. Jorling, as Commissioner & c.,
Respondent.

(Proceeding No. 1)

In the Matter of Egbert Bagg, IV, et al.,
Petitioners,

v.

New York State Department of Environmental Conservation,
Respondent.

(Proceeding No. 2)

A motion for leave to appeal to the Court of Appeals in the above causes having heretofore been made upon the part

of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/_____
Donald M. Sheraw
Clerk of the Court

[DENIAL OF LEAVE BY APPELLATE DIVISION]

At a Motion Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Third Judicial Department, held at the Justice Building in the City of Albany, New York on the 14th day of May, 1990.

PRESENT:

HON. LEONARD A. WEISS,
Justice Presiding,
HON. ANN T. MIKOLL,
HON. PAUL J. YESAWICH, JR.,
HON. THOMAS E. MERCURE,
HON. NORMAN L. HARVEY,
Associate Justices.

STATE OF MEW YORK
SUPREME COURT

APPELLATE DIVISION
THIRD DEPARTMENT

In the Matter of VINCENT J. VACCARO,
Petitioner,

v.

THOMAS C. JORLING, as Commissioner of the New York State Department of Environmental Conservation,
Respondent.

(Proceeding No. 1)

In the Matter of EGBERT BAGG, IV, et al.,
Petitioners,

v.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Respondent.

(Proceeding No. 2)

A motion having been made by petitioners, EGBERT BAGG, IV and CAROLINE BAGG MONSON, at this term of Court in the above-entitled proceeding for an order granting permission to appeal to the Court of Appeals;

NOW, after reading and filing proof of due service of the notice of motion, the affidavit of G. GORDON DAVIS, ESQ., sworn to April 30, 1990, with attachments, in support of the motion, and no one having appeared in opposition thereto, and the Court having rendered a decision on the 29th day of May, 1990, it is hereby

ORDERED, that motion for permission to appeal to the Court of Appeals be, and the same hereby is denied, without costs.

ENTER:

/s/_____
Michael J. Novack, Clerk

DATED and ENTERED: June 4, 1990
A TRUE COPY

/s/Michael J. Novack,Clerk

[SUA SPONTE DISMISSAL BY COURT OF APPEALS FOR WANT OF SUBSTANTIAL CONSTITUTIONAL QUESTION]

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the third day of April A.D. 1990

STATE OF NEW YORK
COURT OF APPEALS

PRESENT, HON. SOL WACHTLER, Chief Judge, presiding.

Mo. No. 334 SSD 20

In the Matter of Vincent J. Vaccaro,
Petitioner,

v.

Thomas C. Jorling, as Commissioner & c.,
Respondent.

(Proceeding No. 1)

In the Matter of Egbert Bagg, IV, et al.,
Appellants,

v.

New York State Department of Environmental Conservation,
Respondent.

(Proceeding No. 2)

The appellant having filed notice of appeal in Proceeding No. 2 and due deliberation having been thereupon had, it is

ORDERED, that the appeal in Proceeding No. 2 be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

/s/_____
Stuart M. Cohen
Deputy Clerk of the
Court

[OPINION BY APPELLATE DIVISION]

Supreme Court - Appellate Division
Third Judicial Department

October 19, 1989 58254

In the Matter of VINCENT J. VACCARO,

Petitioner,

v.

THOMAS C. JORLING, as Commissioner of the New York State Department of Environmental Conservation,

Respondent.

(Proceeding No. 1)

O P I N I O N

In the Matter of EGBERT BAGG, IV, et al.,

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondent.

(Proceeding No. 2)

Argued, September 11, 1989

Before:

HON. LEONARD A. WEISS, Justice Presiding,
HON. ANN T. MIKOLL,
HON. PAUL J. YESAWICH, JR.,
HON. THOMAS E. MERCURE,
HON. NORMAN L. HARVEY, Associate Justices.

PROCEEDINGS initiated in the Appellate Division of the Supreme Court in the Third Judicial Department pursuant to EDPL 207 to review a determination of respondent Commissioner of Environmental conservation which authorized the acquisition of certain real property.

EVANS, SEVERN BANKERT & PEET (Thomas F. O'Donnell of counsel), 231 Genesee Street, Utica, New York 13501, for petitioner in proceeding No. 1.

G. GORDON DAVIS, P.O. Box D-1, Church Street Office Building, Elizabethtown, New York 12932, for petitioners in proceeding No. 2.

ROBERT ABRAMS, Attorney-General, (John J. Pickett of counsel), The Capitol, Albany, New York 12224, for respondent.

MIKOLL, J.

Petitioners Egbert Bagg, IV and Caroline Bagg Monson are holders of life estates in certain real property consisting of approximately 1,063 acres, commonly known as the Pine Lake property, in Hamilton County in the Adirondack Park. The subject property comprises forest lands, Pine Lake and Little Pine Lake, several camps and a portion of the South Branch of West Canada Creek. The latter has been designated a wild river pursuant to ECL 15-2714 (1)(g). The Pine Lake property is completely surrounded by State-owned land designated "wild forest" and has a high priority for acquisition for State land consolidation purposes. After several years of negotiations to purchase the property, respondent Department of Environmental Conservation (hereinafter DEC), notified petitioner Vincent J. Vaccaro, the owner in fee, of the proposed eminent

domain appropriation and offered to purchase the property for $340,000. Vaccaro declined this offer.

After a public hearing pursuant to EDPL article 2 at which, inter alia, hundreds of written statements and petitions signed by over 1,300 persons were submitted in opposition to the appropriation, respondent Commissioner of Environmental Conservation (hereinafter the Commissioner) found that the subject properties were "entirely surrounded by state-owned Forest Preserve lands" and that appropriation of the property would accomplish DEC objectives by:

a. Consolidating state-owned Forest Preserve lands;

b. Providing additional recreational opportunities for the public;

c. Eliminating administrative

and environmental problems associated with increased usage of an access road;

d. Protecting the natural re sources of the property from further development.

The Commissioner ordered the appropriation of the Pine Lake property, subject to the life estates of Bagg and Monson. Petitioners then commenced the present proceedings challenging the Commissioner's determination.

Initially, we find merit to the Commissioner's contention that Bagg and Monson, petitioners in proceeding No. 2 and the owners of a life estate in the Pine Lake property, are not aggrieved persons under EDPL 207(a) because the appropriation was expressly made subject to their interest. Bagg's and Monson's life-estate interest is an exclusive right of use and possession of approximately

eight acres of the Pine Lake property with certain nonexclusive rights in the remaining 1,055 acres. The nonexclusive rights include the right to use a water supply, certain easement rights of egress and ingress, the rights to boat on Pine Lake and to hunt, fish and cut firewood on the remainder of the property.

The Commissioner's determination expressly provides that the life estate will be honored and makes the appropriation subject to those rights. Since their life tenant exclusive rights have been preserved, Bagg and Monson are not aggrieved by the Commissioner's determination as to that part of their interest. Their claim concerning their nonexclusive rights in the remainder of the property is, in essence, in the nature of an easement right over the property for the duration of their life estate interest.

As such, they lack the legal power to prohibit general use or enjoyment of the property by the owner in fee (see, Rahabi v. Morrison, 81 AD 2d 434, 440). Their nonexclusive rights are subject to the fee owner's "right to use its land in any manner that does not unreasonably interfere with the rights of the owner of the easement" (Wechsler v. People, 147 AD 2d 755, 757). Thus, the proposed use by the State, as owner in fee, to allow the public access to the remaining property does not deprive Bagg and Monson of any legal right or unreasonably interfere with their interests in that portion of the Pine Lake property (see, id.). Accordingly, Bagg and Monson have failed to demonstrate that they are aggrieved under EDPL 207(a) by the Commissioner's determination and the petition in proceeding No. 2 should be dismissed.

Turning to the merits in pro-

ceeding No. 1, we reject Vaccaro's argument that the Commissioner exceeded his authority in ordering the appropriation of the Pine Lake property because eminent domain does not apply to lands within the Adirondack forest preserve which are not unique or threatened. In Matter of Bath & Hammondsport R.R. Co. v. New York State Department of Environmental Conservation (73 NY2d 434), the Court of Appeals interpreted the word "acquire" used in ECL 3-0305(1) as authorizing the condemnation of land for the establishment of fish and wildlife areas as set forth in ECL 11-2103 (id., at 438-440).

We also find unpersuasive Vaccaro's contention that, despite the fact that DEC here seeks to acquire the Pine Lake property to accomplish certain DEC objectives, including consolidation of State-owned forest preserve lands and

protection of natural resources from further development, the absence of an express statutory grant of eminent domain requires that exercise of that power be strictly construed, and, thus, its use here is improper. The absence of a specific reference to eminent domain in ECL 9-0105(7) does not preclude the Commissioner from appropriating land to accomplish DEC's objectives of enlarging and protecting the Adirondack forest preserve. The term "acquire" as used in ECL 9-0105(7) includes the power of eminent domain to achieve the objectives stated in ECL 9-0105(7).

We next reject Vaccaro's argument that the power of eminent domain was improperly exercised in this case because the 1972 Environmental Quality Bond Act (see, ECL art. 51) (hereinafter Bond Act) envisions the appropriation of land which is unique and threatened and that there is

not an adequate basis to make such a finding. The implementing legislation of the Bond Act allocated funds, inter alia, for both forest preserve projects in the Adirondack Park and unique area preservation projects (see, ECL 51-0701[1], [3]). The funds appropriated for unique areas are, by definition, for land outside the Adirondack Park (see, ECL 51-0703[4]). By contrast, the "Forest Preserve Project" is a project directed expressly for the acquisition of lands as additions to the forest preserve within the Adirondack Park. Therefore, petitioners' reliance on the Bond Act as allocating funds exclusively for unique areas of land within the Adirondack Park is unsound and inconsistent with the statutory language of ECL article 51. Vaccaro's reliance on the Governor's memorandum (see, Governor's Mem, 1972 NY Legis Ann, at 364) is

misplaced since, contrary to his assertion, the memorandum is susceptible to a broader interpretation than a reference to "unique" areas only. In any event, an executive memorandum cannot vary the plain meaning of a statute, here ECL 51-0703(4) (see, e.g., People v. Graham, 55 NY2d 144, 151).

Finally, Vaccaro's constitutional arguments for voiding the appropriation of the Pine Lake property as unconstitutional on the ground that the acquisition fails to qualify as a public use are also without merit. The constitutional requirement that a taking by eminent domain be for a public purpose has been satisfied. Enlargement of the Adirondack forest preserve is a public use expressly authorized by ECL 3-0305(1) and 9-0105, and legislatively funded by ECL 51-0701(1). Several public purposes previously mentioned are accomplished by this

appropriation. Further, this appropriation will furnish additional recreational opportunities for the public. The record supports the finding that the appropriation in fee, instead of some less restrictive means, was necessary to effectuate the objectives enumerated in ECL 9-0105(7).

The appropriation of the subject property by eminent domain is supported by an adequate basis and has not been shown to be unreasonable or arbitrary (see, Long Is. R.R. Co. v. Long Is. Light Co., 103 AD2d 156, 168, affd 64 NY2d 1088; see also, Town of New Windsor v. City of Newburgh, 124 AD2d 656, 17 Carmody-Wait 2d, NY Prac. Section 108.86, at 564-565).

We have examined Vaccaro's other arguments for invalidating the Commissioner's determination and find them without merit.

Opinion by MIKOLL, J., in which WEISS, J.P., YESAWICH, JR., MERCURE AND HARVEY, JJ., concur.

Determination confirmed, without costs, and petitions dismissed.

[DECISION BY COMMISSIONER OF ENVIRONMENTAL CONSERVATION]

PROJECT: Q-AFP Hamilton 164 ("Pine Lake Property")
Q-AFP Hamilton 284 ("L-D Pond Property")

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONVERSATION

IN THE MATTER OF the proposed Acquisition of 2,306 acres of forest land in the Townships of Morehouse and Arietta, Hamilton County, New York

COMMISSIONER'S FINDINGS AND DETERMINATION

PURSUANT to the Eminent Domain Procedure Law, Article 2, the New York State Department of Environmental Conservation ("Department"), scheduled a public hearing on August 11, 1988 at 1:00 p.m. before Frank Montecalvo, the undersigned's duly designated representative and Administrative Law Judge, to obtain public comment from any and all persons interested in the proposed acquisition of 1036 acres of forest land in the Town of Morehouse, Hamilton County referred to as the Pine Lake Property and of 1,243 acres of

forest land in the Town of Arietta, Hamilton County referred to as the L-D Pond Property.

WHEREAS, said hearing was held on August 11, 1988 and the hearing record was closed on September 23, 1988. The Administrative Law Judge has submitted to the undersigned, the stenographic record of such hearing as well as the Administrative Law Judge's hearing report. Subsequently, Department Staff have submitted comments and recommendations; and

WHEREAS, the Legislature in enacting the Environmental Quality Bond Act of 1986 found that the protection of land is important to the long-term preservation, enhancement, restoration and improvement of the quality of the environment of the State; and

WHEREAS, The Department has authority to acquire land by eminent

domain pursuant to Environmental Conservation Law 3-089 and Environmental Conservation Law Article 9; and

WHEREAS, acquisition of Forest Preserve land serves a public purpose in accordance with Article XIV of the New York State Constitution.

HAVING considered the record and the entire projects herein, my findings are that:

1. The Administrative Law Judge's report is accepted.

2. The owners of the L-D Pond Property have since the date of the hearing entered into a purchase contract with the State of New York.

3. The hearing report shows that the Department proposes to acquire in fee the Pine Lake Property in order to avoid the possibility of substantially increased fording of the South Branch of the West Canada Creek, to consolidate

State land, eliminate administrative and environmental problems associated with increased usage of an access road, to protect the natural resources of the property from further development and to provide additional recreational opportunity for the public. Thus, a public use would be provided for and a public benefit would result from acquisition by the State of this land and its preservation in our Forest Preserve, regardless of the availability of other land for acquisition or the existence of other land in the Forest Preserve.

4. The Pine Lake Property is located in Lots 87, 88, 93, 94 and 99 located in the northern half of Arthurboro Patent, Town of Morehouse and consists of approximately 1,063 acres of forest lands, Pine Lake, Little Pine Lake and several camps.

5. The L-D Pond Property is located in Lots 229 and 230 located in the Oxbow Tract, Town of Arietta and consists of 1,243 acres of forest land.

6. The hearing report shows that there was public support for the proposed acquisitions by persons appearing at the hearing and by not-for-profit associations representing numerous members, and that the sentiment of most of the public which attended the hearing was that there is no public need which will be served sufficient to justify appropriation under the EDPL.

7. The environmental impacts of the proposed projects have been addressed in compliance with Article 8 of the Environmental Conservation Law as implemented by Part 617 New York code of Rules and Regulations by completion of and compliance with a Final Environmental Impact Statement entitled Acquisition of

Forest Preserve Lands Under the 1972 Environmental Quality Bond Act, March 30, 1981.

NOW THEREFORE, my determination based upon the hearing record, the Administrative Law Judge's Report and comments received from Department staff is a follows:

1. All procedural and substantive requirements of Article 2 of the Eminent Domain Procedure Law as it relates to the acquisition have been complied with.

2. The parcels comprising the forest land are entirely surrounded by state-owned Forest Preserve lands. Appropriation, as proposed, would accomplish the Department's objectives by:

a. Consolidating state-owned Forest Preserve lands;

b. Providing additional recrea-

tional opportunities for the public;

c. Eliminating administrative and environmental problems associated with increased usage of an access road;

d. Protecting the natural resources of the property from further development.

3. The life estate enjoyed by Egbert Bagg III and Caroline Bagg Monson on a portion of the Pine Lake Property will be honored and the appropriation will be subject to these rights.

4. The L-D Pond Property will not be included in this acquisition so long as title is vested to the state prior to the acquisition of the Pine Lake Property.

On the basis of the foregoing, IT IS HEREBY ORDERED THAT all remaining necessary administrative actions be taken by

the Department of Environmental Conservation to vest title to the above described Pine Lake Property, and the L-D Pond Property if title is not voluntarily transferred.

IN WITNESS WHEREOF, the Department of Environmental Conservation has caused this Decision to be signed and issued and has filed the same with all maps, papers, reports and other papers relating thereto in its office in Albany, New York on this 22 day of December 1988.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION
THOMAS C. JORLING, COMMISSIONER

/s/_____

(2)

No. 90-1009

FILED
JAN 14 1991
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1990

EGBERT BAGG, IV and CAROLINE BAGG MONSON,

Petitioners,

against

NEW YORK DEPARTMENT OF ENVIRONMENT CONSERVATION,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari

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Dated: January 10, 1991

THE REPORTER COMPANY, INC., Walton, NY 13856—800 252-7181—1991
(4684—CVR-353)

Question Presented

Does the Judgment of the New York courts rest entirely on state law grounds, where this proceeding was dismissed upon the finding that petitioners were not aggrieved persons within the meaning of New York Eminent Domain Procedure Law § 207?

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No. 90-1009

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990.

EGBERT BAGG, IV and CAROLINE BAGG MONSON,

Petitioners,

against

NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondent.

Brief in Opposition to Petition For Writ of Certiorari

Statement of the Case

This proceeding is closely related to *Vaccaro v. Jorling*, No. 90-540, in which this Court denied a petition for writ of certiorari on November 5, 1990.[1] Each proceeding challenges the same determination by the New York Commissioner of Environmental Conservation to acquire by appropriation a 1063 ± acre parcel of wild forest land in the Adirondack Park, known as the "Pine Lake prop-

[1]We find petitioners' failure to mention this decision puzzling, since we forwarded a copy to petitioners' counsel.

erty". This parcel is entirely surrounded by state-owned forest preserve land and contains two lakes, a section of the South branch of the West Canada Creek, several streams and a wetland. The petitioner in *Vaccaro* is the fee owner of the parcel, and petitioners Bagg and Monson hold only a life estate in the same property. This interest includes an exclusive right of use and possession of approximately eight acres of the Pine Lake property and non-exclusive rights to use and enjoy the remaining portion. As described by the Appellate Division, these non-exclusive rights include the right to use a water supply, certain easement rights of egress and ingress, the rights to boat on Pine Lake and to hunt, fish and cut firewood on the remainder of the property (A12).[2]

New York Environmental Conservation Law (ECL) § 9-0105(7) authorizes the New York Department of Environmental Conservation to acquire lands within New York's Adirondack Park which are "deemed necessary for the enlargement of the forest preserve or for the conservation of the lands, forests and waters within the state * * *". New York's Environmental Quality Bond Act of 1972 in turn allocated $44 million for the acquisition of land as additions to the Adirondack forest preserve. ECL §§ 51-0701(1); 51-0703(1).

The Adirondack Park is a six million acre patchwork of public and private lands in Northern New York. ECL § 9-0101(1). Approximately 40% of the park is owned by the State and is known as the "forest preserve". ECL § 9-0101(6). The natural resources and open space of the Adirondack Park are unique and time-honored assets of New York State. For more than a century, New York's Constitution has preserved the wild forest character of the

[2]Parenthetical references are to the petitioners' appendix.

State's Adirondack forest preserve, providing in Article XIV, § 1:

> The lands of the state, now owned or hereafter acquired constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.

Following a public hearing pursuant to Article 2 of the Eminent Domain Procedure Law (EDPL), the Commissioner of Environmental Conservation issued a determination ordering the appropriation of the Pine Lake property (A20-27). The Commissioner found that this acquisition would serve a public purpose, "regardless of the availability of other land for acquisition or the existence of other land in the Forest Preserve" (A23). Specifically, the Commissioner determined in pertinent part that the acquisition would consolidate state-owned forest preserve lands, provide additional public recreational opportunities and protect natural resources from development (A25-26). The determination expressly provided that the Bagg and Monson life estates "on a portion of the Pine Lake Property will be honored and the appropriation will be subject to those rights" (A26).

Both the fee owner, Vaccaro, and the petitioners here commenced proceedings pursuant to EDPL § 207 in the Appellate Division of New York State Supreme Court to review the Commissioner's determination. The proceedings were consolidated for decision in the Appellate Division, and that court confirmed the Commissioner's determination (A7-19). As to this proceeding, the court held that petitioners Bagg and Monson were not "aggrieved

persons under EDPL 207(a) because the appropriation was expressly made subject to their interest" (A11).[3] The court found that their exclusive rights had been preserved and that their non-exclusive rights were in the nature of an easement over the remainder of the property for the duration of their life estates (A12). Under New York law, held the court, such easement rights are subject to the fee owner's general use and enjoyment of the property. Thus, allowing public access to that portion of the property does not interfere with petitioner's legal rights (A13). The court reached the merits in the *Vaccaro* proceeding, holding that the proposed acquisition was within the Commissioner's statutory authority and would serve a valid public purpose (A13-19).

Petitioners subsequently filed a notice of appeal to the Court of Appeals on constitutional grounds pursuant to CPLR 5601(b).[4] On April 3, 1990, the Court of Appeals dismissed that appeal *sua sponte* on the ground that no substantial constitutional question is directly involved (A5-6). 75 NY2d 946. Petitioners then sought leave to appeal, first from the Appellate Division and then from the Court of Appeals. Both applications were denied (A1-4). Petitioners now seek a writ of certiorari in this Court.

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[3]EDPL 207(a) provides that any persons "aggrieved" by a condemnor's determination are entitled to judicial review.

[4]That provision provides in pertinent part for an appeal of right to the Court of Appeals:

> "1. From an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; * * *".

ARGUMENT

The writ should be denied, for the dismissal of this proceeding for lack of standing rests entirely upon state law grounds and the claims are, in any event, without merit.

The Appellate Division's dismissal of this proceeding rests entirely upon an independent and adequate state law ground. The court held that petitioners were not aggrieved within the meaning of EDPL 207 because (1) their exclusive rights were expressly preserved, and (2) under New York law public ownership of the remaining property did not unreasonably interfere with their non-exclusive rights. Since no federal question appears in this case, this Court lacks jurisdiction to review the state court decision under 28 USC § 1257. *Republican National Committee v. Burton,* 455 US 1302 (1982); *Cramp v. Board of Public Instruction of Orange Co.,* 368 US 278, 281 (1961).

Petitioners nevertheless argue that the issue of their standing in this Court raises a separate federal question, relying upon *Phillips Petroleum Co. v. Shutts,* 472 US 797 (1985), and *Princeton v. Schmid,* 455 US 100 (1982). In those cases, however, the state courts found that the parties had standing and adjudicated federal claims. This Court held that in such cases it was not bound by a state court's grant of standing and willingness to address federal claims. To come before this Court, parties must clear the additional barrier of standing to sue in an Article III court. In this case, however, the state court has dismissed a proceeding for lack of standing under state law. That judgment rests on an adequate and independent state law ground, foreclosing jurisdiction in this Court. *Cramp v. Board of Public Instruction, supra,* 368 US at 281-282.

Moreover, even if this Court did address the issue of standing *de novo,* it is clear that petitioners do not meet the federal test of standing. That test requires a showing that the petitioners will suffer some direct injury in fact as a result of the State's appropriation. *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 US 464, 472 (1982). This appropriation will not, however, impair petitioners' exclusive right to possess eight acres of this parcel, for that right will remain intact. Nor will it affect their non-exclusive right to use and enjoy the remaining portion. As noted by the Appellate Division, petitioners have no legal right under state law to prevent the owner from permitting public access to the property or from selling it to any third party, including the State. *See, Wechsler v. People,* 147 AD2d 755, 757 (3d Dept 1989); *Rahabi v. Morrison,* 81 AD2d 434, 440 (2d Dept 1981). It follows, therefore, that an appropriation by the State causes them no injury.

Finally, even if this Court should consider the merits of petitioners' application for a writ of certiorari, it is clear that petitioners have failed to raise a meritorious constitutional claim. Petitioners have mounted the same constitutional challenges to the Commissioner's determination that were raised in the *Vaccaro* proceeding, in which this Court denied certiorari in November. They urge that the proposed appropriation would not serve a valid public use, that it is unnecessary and that it is excessive.[5] Those arguments provided no basis for certiorari when advanced by the landowner in *Vaccaro,* so they obviously do not here when advanced by the life estate holders.

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[5]In their petition for a writ of certiorari, petitioners argue for the first time that their rights in this parcel have been "singled out" for appropriation, depriving them of equal protection (Pet, pp 39-40). Since this issue was not raised below, it is not properly before this Court on review of the state court decision. *Cardinale v. Louisiana,* 394 US 437 (1969).

Although ignored by petitioners, in *Adirondack Railway Co. v. State of New York,* 176 US 335, 349 (1900), this Court long ago recognized that the addition of lands to the Adirondack forest preserve constitutes a valid public purpose. Article XIV, section 1 of the New York Constitution establishes that the protection for future generations of the wild forest lands constituting the Adirondack forest preserve provides an important public benefit to the people of this state.

This Court has also long recognized that the necessity of exercising the power of eminent domain for what is undeniably a public purpose is a legislative determination that is not subject to judicial oversight. *Joslin Manufacturing Co. v. City of Providence,* 262 US 668, 678 (1923); *North Laramie Land Co. v. Hoffman,* 268 US 276, 284 (1925). Thus, courts will not review the size of a public project area such as the Adirondack forest preserve (*Berman v. Parker,* 348 US 26, 35-36 [1954]) or the necessity for appropriating a particular parcel to accomplish a public purpose. *Adirondack Railway Co. v. State of New York,* 176 US at 349.

There is no merit to this petition for certiorari, and it should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Albany, New York
January 10, 1991

Respectfully submitted,

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